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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PLEASANT VALLEY HOSPITAL, INC., and
PLEASANT VALLEY HOME MEDICAL
EQUIPMENT, INC.,
Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent is not satisfied with Petitioners' statement of the Questions Presented.

WHETHER the filing of a "Petition for Rehearing en banc" of a Circuit Court of Appeals' in banc decision tolls the time for filing of a Petition for Writ of Certiorari.

WHETHER, to withstand summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure, an expert's affidavit must contain not only the specific facts and reasoning supporting the expert's conclusions, but also the underlying data supporting the facts.

WHETHER, in an attempt to monopolize case under section 2 of the Sherman Act, compelling evidence of an intent to monopolize or of anti-competitive conduct reduces the level of market share that need be shown to establish a dangerous probability of success of monopolization.

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ADDITIONAL PERTINENT RULE

Rule 705 of the Federal Rules of Evidence, which provides that:

> The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying data on cross-examination.

Respondent disputes that Rule 703 of the Federal Rules of Evidence is involved in this case.

JURISDICTION

Respondent disputes that this Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) in that petitioners have failed to file a timely Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On August 9, 1988, respondent filed a seven count Complaint against petitioners in the United States District Court for the Southern District of West Virginia, Parkersburg Division. The Complaint challenged certain business practices of the petitioners with respect to the provision of durable medical equipment (DME) to Pleasant Valley Hospital's home-bound patients.

Respondent began leasing and selling DME to Mason County, West Virginia patients in 1980. The primary referral source for DME business was Pleasant Valley Hospital, where patients were often discharged with the need for continued convalescence in the home. In November, 1985, Pleasant Valley Hospital started its own for-profit corporation for the provision of DME. Immediately after the hospital's DME company entered the market, respondent received virtually no new DME

business from hospital patients. Respondent's monthly revenues dropped from approximately $35,000 to $8,000.

The methods by which petitioners captured the market formed the basis of the antitrust complaint. First, DME was ordered for patients by hospital personnel without consulting the patient to see if they had a preference for a DME company. Affidavits of Reed Sturgeon (J.A. 145), Karen Broadwater (J.A. 143-44), Jean Taylor (J.A. 135-36), Karen Sue Krebs (J.A. 148-49), and Deposition of Annabelle Castle, pp. 5-7. This had the effect of eliminating any chance respondent may have had to retain any of its previous customers and to preempt the possibility of new business. Second, petitioners caused at least one customer to switch from respondent to the hospital's DME company by unfairly utilizing the fact that the patient's wife worked for the hospital. Affidavit of Maxine Hatfield (J.A. 137-38). Third, the hospital interfered with the medical judgment of its physicians in the treatment of patients in order to secure more business for the hospital DME company. Affidavit of Dr. Georgianna Burns Osborne (J.A. 130-32). Hospital discharge personnel reported to respondent's president that there was nothing that could be done to let any DME business out of the hospital's closed system -- their hands were tied. Deposition of Michael Marnhout, pp. 51-55, 56-61.

Dr. Roger Blair, a noted antitrust scholar, submitted an affidavit in this case concluding that Mason County, West Virginia was the relevant geographic market for purposes of antitrust analysis. (J.A. 150-163). Dr. Blair based his opinion, in part, on a review of the patient origin data provided by petitioners. (J.A. 25-31). Dr. Blair reported his analysis in the affidavit as follows:

> The patient origin data strongly suggest that Mason County residents rely predominantly upon Mason County suppliers for their hospital and medical equipment needs. Some overlap into the neighboring Ohio counties is to be expected but does not change the unmistakable conclusion that Mason County represents a distinct geographic market for antitrust analysis.

In spite of the fact that Holzer Medical Center, across the river in Ohio, was a much more sophisticated facility with more specialized physicians, Pleasant Valley Hospital still provided hospital services for over 65% of Mason County residents. Part of this is explained by the fact that the Mason County physicians only have staff privileges at Pleasant Valley Hospital. Moreover, part of the out migration to Holzer Medical Center is explained by the fact that Pleasant Valley Hospital simply cannot provide some of the services needed by Mason County residents.

The market power of the hospital's DME company was derived directly from the company's pricing behavior. Based upon his study of these prices, Dr. Blair stated the following in his affidavit:

> Pleasant Valley Home Medical Equipment is exercising monopoly power -- i.e. the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer[s]. This is a direct measure of monopoly power.

The trial court rejected Dr. Blair's affidavit because "he set forth no facts to support these opinions, nor has he provided facts to support the Plaintiff's contention that the Defendant Equipment Company has monopoly power in

the DME market". Appendix C to Petition at 49a. As to the hospital's company's control over pricing, the court found Dr. Blair's affidavit deficient because it "cited no specific examples of such conduct". Id.

The appellate history of this case is stated accurately in the Petition. Petition at 6-9.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to consider the Petition for Writ of Certiorari because it was filed more than 90 days after the decision of the Fourth Circuit Court of Appeals sitting in banc. Pursuant to Rule 13.4 of this Court, a suggestion for rehearing in banc does not toll the time for filing a petition for writ of certiorari.

2. The Fourth Circuit applied the proper standard in upholding the sufficiency of Dr. Blair's affidavit. The court, consistent with other circuits, properly held that an expert's affidavit must contain the facts and reasoning supporting the expert's conclusions but need not contain all the underlying data.

3. There was never a question in this case that the facts Dr. Blair relied upon were not of a type reasonably relied upon by economic experts. Petitioners are attempting to inject an issue at this stage of the proceedings which was not considered or ruled upon by the trial court, the panel of the Fourth Circuit or the Fourth Circuit sitting in banc. This question is not properly before the Court.

4. The Fourth Circuit's opinion regarding the elements of an attempt to monopolize claim is entirely consistent with *Spectrum Sports* in that the court specifically required a showing of dangerous probability of success irrespective of the evidence of intent and predatory

conduct. The comment made by the Court that compelling evidence of intent to monopolize or of anticompetitive conduct may reduce the level of market share that need be shown is a correct statement of the law albeit unrelated to the issues in this case.

5. The Fourth Circuit expressed no opinion on the question of whether monopoly leveraging is a cognizable cause of action under Section 2 of the Sherman Act. Review of this issue, in the context of this case, would result in an advisory opinion.

ARGUMENT - REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition for Writ of Certiorari is untimely in that it was not filed within 90 days of the decision of the Fourth Circuit Court of Appeals sitting in banc.

The decision of the Fourth Circuit Court of Appeals, sitting in banc, was rendered in this case on December 9, 1992. On December 22, 1992, the Petitioners filed a document with the Fourth Circuit entitled "Petition for Rehearing en banc". Appendix A. On January 20, 1993, the Fourth Circuit amended the December 9, 1992 opinion correcting some typographical errors appearing in the original decision. Appendix B. On January 22, 1993, the Court entered its Order denying the "Petition for Rehearing en banc" and reported the results of a poll taken of all eligible, active and participating judges. Appendix E to Petition for Writ of Certiorari. Judge Butzner, Senior Circuit Judge, was not polled. The Petition for Writ of Certiorari was filed on April 22, 1993: (1) 134 days from December 9, 1992; (2) 92 days from January 20, 1993; and (3) 90 days from January 22, 1993.

Rule 13.1 of this Court requires a Petition for Writ of Certiorari to be filed within 90 days of the entry of judgment of the court of appeals. Rule 13.4 provides for tolling of the time for filing under certain circumstances:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule. (emphasis supplied)

There can be no question that if the document filed on December 22, 1992 by petitioner in this case was a suggestion for a rehearing in banc, the Petition for Writ of Certiorari was untimely.

There is no provision in the Federal Rules of Appellate Procedure for a Petition for Rehearing in banc. A party may petition for rehearing before a panel of the United States court of appeals under Rule 40, file a suggestion for a rehearing in banc under Rule 35, or do both, separately or together. *Missouri v. Jenkins*, 495 U.S. 33, 47 (1990). It is apparent from the procedure followed by the Fourth Circuit that the Court recognized and treated the petitioner's "Petition for Rehearing en banc" in the only manner recognized by the Federal Rules of Appellate Procedure, i.e., as a suggestion for a rehearing in banc.

The first clear indication of how the Fourth Circuit viewed the "Petition for Rehearing en banc" is that Judge Butzner, the only senior circuit judge on the in banc panel, was not permitted to vote on whether to rehear the case. Rule 35(a) of the Federal Rules of Appellate Procedure mandates this action:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc.

Rule 35(b) of the Rules of Fourth Circuit states, in part:

> A majority, but no fewer than four, of all eligible, active and participating judges may grant a hearing or rehearing in banc.

Because Judge Butzner was on senior status, he was not in regular active service and, therefore, pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure and Rule 35(b) of the Rules of the Fourth Circuit, was not permitted to participate in the vote. It would not have been appropriate to exclude Judge Butzner had the "Petition for Rehearing en banc" been deemed a Rule 40 petition.

The Fourth Circuit's Order denying the "Petition for Rehearing en banc" also reflected the vote of each participating judge. This procedure comes directly from the Fourth Circuit's Rule 35(b) procedure.

> If a poll is requested, the order will reflect the vote of each participating judge.

No similar provision exists under the Fourth Circuit's Rule 40 procedure.

Notwithstanding how the petitioner styled or denominated its "Petition for Rehearing en banc" filed on December 22, 1992, it is clear that it was in fact a suggestion for rehearing in banc pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure. As such it did not toll the deadline for filing the petition for writ of certiorari in this Court. Therefore, petitioner's petition is untimely irrespective of whether the Fourth Circuit's decision is deemed to have been entered on December 9, 1992 (the reported date of the decision) or on January 20, 1993 (the date of the amendment of the decision).

II. The Rule 56(e) Standard Applied by the Fourth Circuit to Dr. Blair's Affidavit Does Not Conflict with the Decisions from Other Circuits.

Petitioners claim that "the decisions cited by the en banc majority are inconsistent with a number of other Courts of Appeals' decisions". Petition at 11. However, review of the cases cited by petitioners reveals harmony rather than discord among the circuits on the issue of the sufficiency of an expert's affidavit. The opinion of Judge Butzner in the instant case explains in some detail how the Courts of Appeal have consistently treated the possible tension between Rule 56(e) of the Federal Rules of Civil Procedure and Rule 705 of the Federal Rules of Evidence.

First, it is clear that "[A]n expert's affidavit that is wholly conclusory and devoid of reasoning does not comply with Fed.R.Civ.P. 56(e)" and that "[T]he deficiencies in such an affidavit are not remedied by resort to the Federal Rules of Evidence". Appendix A to Petition at 8a. In support of these propositions the in banc majority cited the following cases: *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd.*, 823 F.2d 829, 832 (4th Cir. 1987); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989); *Evers v. General Motors*

Corp., 770 F.2d 984, 986 (11th Cir. 1985); *United States v. Various Slot Machines*, 658 F.2d 697, 699-701 (9th Cir. 1981); and *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977)[1]. Id.

However, numerous courts have held, consistent with the Fourth Circuit's decision herein, that a clear distinction exists between an affidavit wholly devoid of facts and reasoning and one which contains facts and reasoning but which omits the underlying data. *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir. 1985); *Monks v. General Electric Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990); *Ambrosini v. Laborranque*, 966 F.2d 1464, 1470-71 (D.C. Cir. 1992); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980). The in banc majority opinion easily harmonized the latter cases with the "wholly conclusory" cases as follows:

> But the primacy of Fed.R.Civ.P. 56(e) does not exclude all applications of the Federal Rules of Evidence pertaining to an expert's opinion in summary judgment proceedings. In view of Fed.R.Evid. 1101(b), which makes the Federal Rules of Evidence apply generally to all civil actions, Fed.R.Evid. 705 and Fed.R.Civ.P. 56(e) must be reconciled. Federal Rule of Evidence 705 permits an expert to give reasons for an opinion "without prior disclosure of the underlying facts or data unless the court requires otherwise". As previously

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[1] Each of these cases were cited by petitioners in their motion for rehearing as being in conflict with the panel opinion. Petitioners now cite the following three cases which were never cited to the Fourth Circuit: *Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 n.4 (5th Cir. 1990); *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-80 (11th Cir. 1985); and *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n.*, 745 F.2d 248, 261-62 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

> noted, we believe that Fed.R.Civ.P. 56(e) trumps this rule of evidence with respect to the disclosure of facts in a summary judgment proceeding. Nevertheless, Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705 can be reconciled with respect to data supporting the facts. Neither rule requires prior disclosure of the supporting data -- in this case patients' addresses and DME prices. Furthermore, both rules contemplate supplementation of the expert's affidavit to disclose supporting data if the court deems the disclosure to be necessary before it decides the motion for summary judgment.

Appendix A to Petition at 9a. Thus, there is nothing novel or incongruent with the Fourth Circuit's approach. It merely ruled that an expert must state the supporting facts and reasoning in the affidavit but need not include the entire data base. None of the cases cited by petitioners would hold differently.

Merit Motors involved an antitrust challenge by a Chrysler dealer to Chrysler's special fleet sales programs. The plaintiff automobile dealers proffered Professor Richard Staelin as an expert to prove how the fleet sales programs injured competition. Chrysler took the expert's deposition and in such deposition Professor Staelin gave the opinion, based solely on "standard economic theory", that the "inevitable effects" of Chrysler's programs was to injure plaintiffs and competition. Professor Staelin admitted, in his deposition, that he was unfamiliar with the record in the case and that his conclusions were bases only on economic theory. In fact, many of Professor Staelin's assumptions were entirely contradicted by record evidence. The District Court dismissed Professor Staelin's theory "since his opinion is based solely on speculations and hypotheses and is unsubstantiated by any evidence in the record". Id. at 672, quoting from 417 F.Supp. at 272. The Fifth Circuit affirmed stating that Rule 703 cannot prevent

a court from granting summary judgment against a party who relies solely on an "expert's opinion that has no more basis in or out of the record than Staelin's theoretical speculation. . . ." Id. at 673. Thus, the expert's affidavit was deficient in that it failed to state the facts and reasoning underlying his conclusions.

Evers involved a claim by the plaintiff that Chrysler's failure to provide air bags in their automobiles rendered such automobiles defective and unreasonably dangerous. Two days prior to the summary judgment hearing, plaintiff submitted the affidavit of Carl F. Thelin which concluded that an air bag restraint system would probably have reduced the severity of, or prevented plaintiff's injuries. The affidavit contained no explanation or facts to support this conclusion. Moreover, the affidavit was directly contradictory to plaintiff's other expert who testified in deposition that air bags are not designed to provide protection in a side impact collision (which this was). The Eleventh Circuit rejected the affidavit as being merely conclusory. "There is no specific mention of how an 'air bag' would have aided in a side-impact collision". Id. at 986-87. Again, the affidavit was defective because it failed to state the facts and reasoning underlying the expert's conclusions.

Mid-State is yet another example of an expert stating bare legal conclusions without a scintilla of factual predicate or economic reasoning. The issue involved was whether the defendant bank's loan practice, which included a locked box or blocked account, was a violation of an implied covenant of good faith and fair dealing. The bank explained that the blocked account practice was necessary as additional security for outstanding loans to the customer whose checking account was blocked in the event of a loan payment default. In opposition to this testimony, the plaintiff offered the affidavit of Dr. William R. Bryan who

concluded that the blocked account was (1) not necessary, (2) not appropriate, (3) contrary to good faith and fair dealing, and (4) the cause of plaintiff's demise. Nowhere in the affidavit did the economist give any basis or reasoning process which lead to his counter-intuitive conclusions. The trial court rejected the affidavit and the Seventh Circuit affirmed stating,

> Rule 705 of the Federal Rules of Evidence allows experts to present naked opinions. Admissibility does not imply utility. Professor Bryan presented nothing but conclusions -- no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected. Rule 56(e) of the Rules of Civil Procedure provides that affidavits supporting and opposing motions for summary judgment must do more than present something that will be admissible in evidence. They shall "set forth facts" and by implication in the case of experts (who are not "fact witnesses") a process of reasoning beginning from a firm foundation.

Id. at 1339.

Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984), is another case of an expert relying exclusively on "economic theory" and surmise in order to render expert opinions. The affidavit of Dr. Comanor at issue was replete with statements inconsistent with record evidence and was based almost entirely on economic reasoning rather than any facts specific to the case. Again, the court correctly rejected the affidavit as entirely conclusory.

Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990), rejected the affidavits of two doctors primarily because the sources of the experts' opinions were examination reports which were shown to be replete with "so many obvious errors as to be of no value to the trier of

fact". Id. at 307. Significantly, the *Slaughter* court held that its decision was in no way inconsistent with the Ninth Circuit's decision in *Bulthuis v. Rexall Corp.*, 789 F.2d 1315. *See*, 919 F.2d at 307 n.4.

Similarly, in *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985), the expert's affidavit was based entirely on the unreliable lay testimony of the client. The court held that an economist would not reasonably rely on such data in formulating opinions.

The rule announced by the Fourth Circuit in the instant case falls squarely within the holdings of the cases which petitioners claim to be in conflict.

> In sum, we reiterate that an expert's conclusory affidavit lacking facts does not satisfy the requirements of Fed.R.Civ.P. 56(e). In contrast, an affidavit that states facts on which the expert bases an opinion satisfies Fed.R.Civ.P. 56(e) even though the expert does not attach the data supporting the facts. If need be, the court, acting pursuant to Fed.R.Civ.P. 56(e) and Fed.R.Evid. 705, can require the expert to furnish the supporting data.

Appendix A to Petition at 10a. Accordingly, there is no basis for this Court to grant the Petition for Writ of Certiorari premised on an alleged conflict among the Circuit Courts of Appeal.

III. Whether Dr. Blair's Affidavit Relied on Facts of a Type Reasonably Relied Upon by Economic Experts Was Never an Issue in this Case

Petitioners fault the in banc majority opinion in this case because it "failed to address the central deficiency of Dr. Blair's affidavit: its failure to rely on facts of a type

reasonably relied upon by economic experts". Petition at 13. However, this is the first time that this issue has arisen in the five year history of this case. Petitioners never mentioned it in their briefs to the trial court, in their original brief to the Court of Appeals, in their brief in support of their petition for rehearing of the panel opinion, in their brief in support of their "Petition for Rehearing en banc", in any of their supplemental briefs, or in any of their oral arguments. Likewise, none of the courts which have considered this case have made any mention of the alleged "central deficiency" of Dr. Blair's affidavit. This argument is nothing more than a classic afterthought.

The primary reason that the issue has never arisen prior to this time is that the district court's decision that Dr. Blair's affidavit "set forth no facts to support these opinions". Appendix C to Petition at 49a. If the affidavit set forth no facts then it would seem illogical to then say that the facts set forth are not of the type reasonably relied upon by economic experts. This simply was not part of the decision which was appealed and did not come before either the panel or the Fourth Circuit sitting in banc. It is entirely inappropriate to raise an issue at this junction of the proceedings which has never been raised before. *Weinberger v. Rossi*, 456 U.S. 25, 36 n. 18 (1982); *Federal Trade Commission v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960).

IV. The Fourth Circuit's Opinion is not in Conflict with *Spectrum Sports* in that the Court Did Require a Showing of a Dangerous Probability of Monopolization Independent of Evidence of a Specific Intent to Monopolize.

Petitioners claim that the in banc majority opinion in this case is inconsistent with the Court's recent opinion in

Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884 (1993), with respect to the requirement of a showing of dangerous probability of monopolization in an attempt to monopolize case. However, a review of the two opinions clearly demonstrates that the Fourth Circuit's treatment of the elements of an attempt to monopolize is well within the parameters articulated by this Court.

Spectrum Sports was a direct challenge to a rule which had developed in isolation in the Ninth Circuit. The rule held that evidence of a dangerous probability of monopolization was not necessary in an attempt to monopolize case where there was evidence of unfair or predatory conduct. This rule was out of step with the accepted jurisprudence in the other circuit courts of appeal. This Court held that "petitioners may not be liable for attempted monopolization under section 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." Id. at 892.

The in banc majority opinion in the instant case articulated the elements of an attempt to monopolize under § 2 of the Sherman Act as follows:

(1) a specific intent to monopolize the relevant market;

(2) predatory or anticompetitive acts in furtherance of the intent; and

(3) a dangerous probability of success.

Appendix A to Petition at 11a. "The third element of attempted monopolization, a dangerous probability of success, must be shown to be substantial and real". Id. at 15a. The opinion went on to state that,

> Market share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown.

Id. Nowhere in the opinion did the court state that the third element of the offense, dangerous probability, is unnecessary to prove. Quite the contrary.

Petitioners misread the Fourth Circuit's opinion when they state that "according to the standard established by the en banc majority, the quantum of evidence necessary to establish a dangerous probability of monopolization is dependent on the type and extent of the evidence provided regarding the other two required elements. . .". Petition at 22. In fact, the court did not state that the quantum of evidence of dangerous probability was dependent on the proof adduced on the other elements. The court merely stated that the market share of the defendant need not be proven to be as high when there is compelling evidence of intent or predatory conduct. The court went on to discuss other factors which may effect the probability of successful monopolization, including the trend in market share, ease of entry and exclusionary conduct without the justification of efficiency. Each of these factors may effect the likelihood of success of the attempt to monopolize. Nowhere in the opinion did the court retreat from its pronouncement that a dangerous probability must be shown to be substantial and real.

Moreover, the Fourth Circuit's market share discussion was *obiter dictum*, as applied to the instant case. Here there was direct evidence that Pleasant Valley Home Medical Equipment, Inc. was actually exercising monopoly power. Dr. Blair's affidavit stated,

> Pleasant Valley Home Medical Equipment is exercising monopoly power -- i.e., the power to raise price or exclude competition. Pleasant Valley Home Medical Equipment has held its prices above those charged by M & M Supplies and Services on numerous articles of DME for over a year without losing significant numbers of customer[s]. This is a direct measure of monopoly power.

Petitioners correctly point out that market share is but a surrogate or proxy for the existence of monopoly or market power. Petition at 22. And although monopoly power may be inferred from market share information[2], "the ultimate consideration in such a [monopoly power] determination is whether the defendants control the price and competition in the market. . .". *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 380 (1956). Evidence of the actual existence and exercise of monopoly power obviously satisfies the dangerous probability of success element of attempted monopolization.

V. The Fourth Circuit Did Not Reach the Question of Whether Monopoly Leveraging is a Cause of Action Distinct from Attempted Monopolization.

Petitioners ask this Court to review the Fourth Circuit's opinion on the question of the existence of a cause of action under section 2 of the Sherman Act denominated as monopoly leveraging. The Fourth Circuit, however, expressed no opinion on this issue.

> In *Advanced Health-Care*, 910 F.2d at 149-50 & n. 17, we reversed the dismissal of a leveraging claim, while expressly reserving judgment until the advent of "a case in which the issue is squarely presented". Again, we express no opinion on this question but assume for

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[2] *United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).*

> purposes of remand that monopoly leveraging is a separate violation of section 2. There will be time enough to evaluate the validity of this assumption after the parties have developed a factual record.

Appendix A to Petition at 16a (emphasis added). In light of the fact that the Fourth Circuit has yet to rule on this question, any opinion by this Court in the context of this case would clearly be advisory.

CONCLUSION

There is no basis for this Court to grant the Petition for Writ of Certiorari in this case. First, the Court lacks jurisdiction because the petition was untimely. Second, the Fourth Circuit's opinion with respect to the sufficiency of an expert's affidavit is in harmony with the other Circuits which have addressed this question. Third, the Rule 703, Fed. R. Evid. argument made by petitioners has never been previously raised in this case. Fourth, the elements of attempted monopolization were clearly and accurately articulated and applied by the Fourth Circuit. And, finally, the Fourth Circuit expressed no opinion on the issue of monopoly leveraging as a cognizable cause of action under the Sherman Act. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

90-3100

M & M MEDICAL SUPPLIES AND SERVICE, INC.
Plaintiff-Appellant,
v.

PLEASANT VALLEY HOSPITAL, INC. and
PLEASANT VALLEY HOME MEDICAL EQUIPMENT, INC.
Defendants-Appellees.

PETITION FOR REHEARING EN BANC

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INTRODUCTION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and IOP 40.1, the Petitioner-Appellees -- Pleasant Valley Hospital ("Hospital") and Pleasant Valley Home Medical Equipment Company ("Equipment Company") -- respectfully petition the court for a rehearing concerning the court's opinion dated December 9, 1992.

In the opinion of Counsel:

1. The opinion overlooks the material facts that M&M Medical Supplies and Service, Inc. ("M & M") does not meet the test established by the majority for "attempted monopolization."

2. The opinion overlooks the following material points of law:

   a. An expert-is required to rely only on facts relied upon by experts in the field.

   b. A trial court has discretion to refuse to permit supplementation of the experts' affidavits.

   c. The affidavit submitted by M & M's expert did not meet an economically accepted definition of market definition.

   d. The affidavit submitted by M & M's expert did not establish monopoly power by an economically acceptable methodology.

   e. M & M has not established antitrust injury.

3. The opinion is in conflict with at least six decisions of other Courts of Appeals which are not addressed in the opinion.[1]

BACKGROUND

The only evidence offered by M & M regarding its allegations that the appropriate market for DME services was limited to Mason County, West Virginia, and that the Equipment Company had monopoly power in that geographic market was an affidavit containing the professional opinions of M & M's expert economist, Dr. Roger Blair. Chief Judge Hayden considered Dr. Blair's affidavit, and found it insufficient, holding that it did not meet the requirement of Rule 56(e), that "an expert's affidavit must set forth specific facts showing that there is a genuine issue for trial." *M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 738 F. Supp. 1017, 1020 (S.D.W. Va. 1990), citing Fed. R. Civ. P. 56 (e). Judge Hayden also noted that pursuant to Rule 703 of the Federal Rules of Evidence, experts may rely on

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[1] Although cited by the Petitioner, the majority en banc opinion failed to address several United States Court of Appeals decisions determinative of the issues in this case, including: *Alaska Airlines, Inc., v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); *Fineman, The Indus. Network Sys. Inc. v. Armstrong World Indus., Inc.*, No. 91-5613, 1992 WL 309215, 1992-2 Trade Cas. (CCH) ¶ 70,010 (3d Cir. Oct. 28, 1992); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 494 (3d Cir.), *cert denied*, 113 S. Ct. 196 (1992); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991), *cert denied*, 112 S. Ct. 1280 (1992); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991).

inadmissible facts so long as they are of the type "reasonably relied on by experts in that field."

In its en banc decision this Court's majority reversed, holding that Dr. Blair had omitted from his affidavit only "the underlying data supporting his facts," rather than the facts themselves. Slip Op. at 7.

THE EN BANC MAJORITY FAILED TO REQUIRE DR. BLAIR'S AFFIDAVIT TO MEET THE PROPER STANDARD FOR EXPERT OPINIONS

The en banc majority failed to address the central deficiency of Dr. Blair's affidavit. As an expert, Dr. Blair was required to support his expert opinions by reliance on facts of a type relied on by economic experts. *See Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991), *cert denied*, 112 S. Ct. 1280 (1992); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992).[2]

This court has, itself, required "a substantial acceptance in the relevant discipline" before a scientific hypothesis can be considered as probative evidence. *United States v. Gould*, 741 F.2d 45, 49 (4th Cir. 1984).

> The determination whether proffered scientific evidence has the requisite 'tendency' to prove the existence or nonexistence of the consequential fact in issue must certainly contemplate a determination . . . that the generalized proposition upon which it is based is, as a matter of judicial notice, manifestly false . . . . From this, it is but an obvious step to determining that the 'generalized proposition' has simply not been shown by the proponent of the evidence to have the

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[2] Both cases were cited by Petitioner in its initial Suggestion for Rehearing En Banc, but were not discussed by the Majority in its opinion.

requisite validity to stand as the major premise of the relevant syllogism.

Id. at n.2. Summary judgment cannot be forestalled by reliance on an expert affidavit premised on economic analysis that is without acceptance in the economic community. Such an affidavit is without "foundational relevance." *Id.*

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY NOT PERMITTING DR. BLAIR TO SUPPLEMENT HIS AFFIDAVIT

The majority opinion holds that "F.R.C.P. 56(e) does not mandate exclusion of an affidavit for the lack of the underlying data supporting an affiant's assertion of facts." Slip. Op. at 7. But neither does the rule preclude such exclusion (or rejection). Indeed, the language of the Rule is explicitly permissive and discretion.[3] It states that "the court may permit affidavits to be supplemented. . . ." Fed.R.Civ.P. 56(e) (emphasis added); see *Christophersen* at 1109.[4] Moreover, in an analogous situation regarding the admissibility of expert opinion, this Court itself has held

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[3] The need for discretion is underscored by the facts in this case. Specifically, petitioner served M & M with an interrogatory inquiring about its experts' opinions, so that discovery deposition could be scheduled. M & M was unresponsive to the interrogatory, but promised to supplement its response at the time its expert had formulated his opinions. This was not done prior to the time discovery was closed. Thus, Dr. Blair's affidavit was the first (and only) notification of Dr. Blair's opinions ever received by petitioner. Under these circumstances, it can hardly be said that the trial court abused its discretion in failing to permit M & M to supplement the affidavit of its economic expert.

[4] Again, *Christophersen* was not discussed by the majority, although it was prominently displayed in Petitioner-Appellees' initial suggestion for rehearing en banc.

that the decision "is normally within the discretion of the trial judge." *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.) (Butzner, J.), *cert. denied*, 423 U.S. 1019 (1975). Where it is clear from the face of an affidavit that the facts relied upon by the expert are not "of a type reasonably relied on by experts in the field" to support the expert's opinions, a trial court does not abuse its discretion by rejecting the affidavit without first permitting supplementation.[5]

There can be no doubt that the facts relied upon by Dr. Blair to support his opinions are not "of a type reasonably relied on by experts" in the field of economics.

DR. BLAIR'S MARKET DEFINITION METHODOLOGY WAS UNACCEPTABLE

In order to support his opinion that the Equipment Company monopolized the DME market, Dr. Blair was required to define a relevant geographic area for the DME market -- i.e., Mason County -- and to establish that the Equipment Company had monopoly power in that market. Plainly, there is no supportable factual basis in Dr. Blair's affidavit upon which an economic expert could properly opine that Mason County is the relevant geographic

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[5] In another closely analogous situation, the Third Circuit, sitting en banc, affirmed the district court's grant of summary judgment notwithstanding the existence of an affidavit from the plaintiff's economic expert who articulated the expert's opinion regarding the relevant market and stated that the defendant had market power in that market. *Town Sound*, 959 F.2d at 494. The court simply concluded that the experts' opinions did not comport with the appropriate economic analysis. *Id.*

market for DME.[6] Dr. Blair's market analysis is based on the so called Elzinga-Hogarty test, a commonly used economic methodology which defines the relevant geographic market on the basis of the extent of the "leakage" into the proposed geographic market area from outside the market and out of the proposed market area from inside. *U.S. v. Rockford, Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill 1989) *aff'd* 898 F.2d 127, (7th Cir.), *cert denied*, 111 S. Ct. 295 (1990) (discussion of Elzinga-Hogarty test); *In the Matter of Adventist Health Systems/West, and Ukiah Adventist Hospital*, FTC Docket No. 9234 (A.L.J. Parker, Dec. 9, 1992) (attached hereto) [sic]. Where the leakage under both measures is more than 25% economists reject the proposed geographic area as too small to be even a "weak" geographic market. *Rockford*, 717 F. Supp. at 1266-73; *Adventist Health System* at 12-15. In this connection, there was no way for Dr. Blair to plausibly assess the leakage out of Mason County for DME given his concession that he examined the customer origin data of only a single supplier (out of the five located in Mason County and the five more located in the two contiguous counties).[7] The geographic area in which a single market participant operates does not define the geographic market. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). Nor did Dr. Blair's affidavit even claim that he analyzed the number (and/or percentage) of DME customers living outside of Mason County who obtained DME supplies within Mason County. Finally, Dr. Blair does not even

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[6] Dr. Blair's opinion that Mason County is also the relevant market for hospital services, which is essential to M & M's monopoly leveraging claim is subject to the same methodological deficiencies.

[7] The five (5) DME suppliers located in Mason County are Hockenberry Pharmacy North, Fruth's Pharmacy, Health-Aid Pharmacy, M & M and the Equipment Company. J.A., Vol. I, p. 13, fn 6; p. 41 and there are ten DME companies in the area. J.A., Vol. I, p. 40.

assert (nor could he) that the leakage both into and out of his proposed geographic market area is less than 25%.

DR. BLAIR'S AFFIDAVIT DID NOT ESTABLISH MONOPOLY POWER

Even if Dr. Blair's affidavit could support his opinion that the relevant geographic market for DME was Mason County, which he cannot, he offers no basis for his opinion that the Equipment Company is exercising "monopoly power" in the DME market in that geographic area.[8] The existence of market power ordinarily "is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Tech. Serv., Inc.*, 112 S. Ct. 2072, 2081 (1992), citing *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984). Of course, monopoly power requires something greater than market power. *Eastman Kodak*, 112 S. Ct. at 2090. Thus, in *Eastman Kodak* the Supreme Court found that defendant's control of more than 80% of the relevant market with no readily available substitutes was sufficient evidence of monopoly power to withstand a motion for summary judgment. *Eastman Kodak* at 2090. In contrast, Dr. Blair provided no calculation of the market share controlled by the Equipment Company within the single county market which he asserts, nor could he, given the fact that he examined the data of only one of the five DME dealers within Mason County.

Instead, to establish sufficient evidence of Equipment Company's monopoly power, Dr. Blair asserts the company has been able to hold "its prices above those charged by M & M on numerous articles of DME for over a year

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[8] Dr. Blair offered no opinion with respect to the Hospital's monopoly power in the market for hospital services. Such an opinion is an essential element in M & M's monopoly leveraging claim.

without losing significant numbers of customers."[9] Plainly, the mere fact that one supplier of a product is able to profitably charge more than another without losing customers does not, without more, demonstrate the existence of monopoly power.

As previously stated, monopoly power is something greater than market power which is defined as the power to profitably raise prices above competitive levels. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984); *Jefferson Parrish*, 466 U.S. at 27 n.46; *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 528 n.8 (4th Cir. 1989). Yet, the mere fact that the Equipment Company is able to charge more than M & M does not establish that the Company's prices were higher than competitive levels. There are three other DME dealers within Mason County and it is certainly possible that all of them were charging more than either M & M or the Company. Dr. Blair's affidavit did not (and could not) say. Moreover, the facts in Dr. Blair's affidavit simply do not support a conclusion that the Equipment Company had monopoly power. Not all customers for DME are former patients of the Hospital. Plainly, petitioner has no way of controlling the DME choices of non-Hospital patients. Thus, if the Equipment Company's charges were raised above competitive levels, then the Company would lose non-Hospital based customers.[10] *Kodak* at 2083-84. Yet, Dr. Blair's affidavit states that the Equipment Company did not lose customers. The logical conclusion is that the Equipment Company's prices may have been above M & M's but they were not above competitive levels.

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[9] Significantly, Dr. Blair Does not claim the Equipment Company charged monopoly prices, nor could he.

[10] Of course, Petitioner's evidence suggest that, in fact, the Equipment Company's prices were low, or at least no higher than M & M's.

REQUIRING RIGOROUS STANDARDS FOR EXPERT TESTIMONY IS CRITICAL IN ANTITRUST CASES

The requirements of market definition and monopoly power are not merely ritualistic talismans requiring the incantation of magic words by a plaintiff's expert economist in order to withstand a motion for summary judgment. Rather, these requirements are imposed to ensure that a plaintiff's economic expert can demonstrate a sufficient danger of harm to consumers (rather than competitors) to justify an expensive, and time-consuming trial, where a plaintiff can prevail (and obtain treble damages and attorney's fees) simply because the jurors erroneously conclude that the goal of the antitrust laws is fairness to competitors, rather than injury to consumers.[11] *See* William G. Kopit and Robert W. McCann, *Old Wine in New Bottles*, 26 Wake Forest L. Rev. 3 (1991).

Permitting a plaintiff to withstand summary judgment by offering expert economic opinions not supported by sound analysis clearly and substantially increases a defendant's risk. If Dr. Blair's affidavit is legally sufficient then RCA could establish that Sony has monopoly power because some of its prices are higher; Lincoln could establish that Cadillac has monopoly power because some of its prices are higher; and Cadillac could establish that Mercedes has monopoly power because some of its prices are higher. That is not the law. "[T]he relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level." *Drs. Steuer & Latham, P.A. v. Nat. Med. Enter., Inc.*, 672 F. Supp. 1489, 1502 (D.S.C. 1987), *aff'd*, 846 F.2d 70 (4th Cir. 1988).

Indeed, if Dr. Blair's affidavit is legally sufficient to withstand a motion for summary judgment challenging a

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[11] For that reason it is often preferable, purely as a business decision, to settle rather than run the risk of an extensive award.

plaintiff's market definition and assertions of monopoly power, then plaintiffs will simply hire experts willing to opine generally that the defendant has been able to successfully charge more than the competing plaintiff. Moreover, experts are free to rely on facts provided by others, thus experts presumably would be able to rely on a general assertions made, not by the experts themselves, but by their clients in affidavits, or in verified complaints. Yet we Rule 56(e) provides that a party opposing a motion for summary judgment "may not rest upon the mere allegations . . . but . . . by affidavits or as otherwise provided in this Rule must set forth specific facts showing that there is a genuine issue for trial." *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 927 (4th Cir. 1990). An expert's opinions, not supported by facts relied upon by experts in the field should not be permitted to eviscerate that requirement.

M & M CANNOT SATISFY THE MAJORITY'S TEST FOR ESTABLISHING AN ATTEMPT TO MONOPOLIZE

The majority opinion correctly recognizes that M & M's attempted monopolization claim requires, as an essential element, a dangerous probability that the Equipment Company will monopolize the DME business in the relevant market.[12] The majority opinion goes on to enunciate a sliding scale for the minimum market share necessary to establish a dangerous probability of monopolization. Slip. Op. at 13.[13]

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[12] As previously noted, Dr. Blair's failure to use an acceptable economic methodology to establish that the relevant market for DME is limited to Mason County should, by itself, permit summary judgment.

[13] Unlike the Ninth Circuit, this circuit has never held that the elements of an attempt to monopolize may be inferred solely from predatory conduct. *See McQuillan*

(continued...)

The greater the proof that plaintiff has met the other two elements -- i.e., a specific intent to monopolize and predatory or anticompetitive acts in furtherance of the attempt -- the lower the market share required. *Id.* Nevertheless, it is clear that, regardless of the strength of the other two elements, the Equipment Company cannot satisfy dangerous probability position of the test. There is no evidence in the record to support the implicit assertion that the Equipment Company's market share in the DME market is more than the minimum required (30%), or any other percentage, even if Dr. Blair's affidavit is given full weight. Clearly, Dr. Blair offered no assessment of market share at all, nor could he, given his concession that he reviewed customer origin data of only one company (out of the five located in Mason County).[14] Because M & M cannot establish a dangerous probability of success under the test enunciated by the majority, summary judgment must be granted on M & M's attempted monopolization claim.

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[13](...continued)
v. Sorbothane, Inc., 907 F.2d 154 (Mem.) (9th Cir. 1990) *cert. granted sub. nom., Spectrum Sports, Inc. v. McQuillan*, 112 S. Ct. 1557 (1992). The Ninth Circuit's rule is currently being considered by the Supreme Court. *See Talking Yellow Pages, Inc. v. Pacific Telesis Group*, 972 F.2d 1343 (Mem.) (9th Cir.), *cert denied*, No. 92-615, 1992 WL 303339 (1992).

[14] Nor is there any other evidence in the record from which DME market share can be inferred.

MONOPOLY LEVERAGE IS NOT A SEPARATE CAUSE OF ACTION

The majority opinion also reinstated M & M's monopoly leveraging claim.[15] However, Judge Hayden correctly concluded that there is no separate claim for monopoly leveraging where, as here, the plaintiff cannot establish "a dangerous probability of monopolization." Since Judge Hayden's decision two other circuits have agreed with Judge Hayden's conclusion that monopoly leveraging does not exist as a separate cause of action. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992); *Fineman, The Indus. Network Sys., Inc. v. Armstrong World Indus., Inc.*, No. 91-5613, 1992 WL 309215, 1992-2 Trade Cas. (CCH) ¶ 70,010 (3d Cir. Oct. 28, 1992). Petitioner submits that these opinions, which were not discussed by the majority, are manifestly correct and should be followed in this circuit.

PLAINTIFF HAS NOT ESTABLISHED ANTITRUST INJURY THIS CASE

In *Advanced Health Care Serv., Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990), this Court correctly held that liability under the antitrust laws requires a plaintiff to establish antitrust injury. Ordinarily, the fact that defendant's prices are higher than the plaintiff's cannot establish such injury. *Drs. Steuer & Latham*, 672 F. Supp. at 1502. Indeed, a competitor's higher prices are likely to benefit lower priced competitors. *Atlantic Richfield Co. v. USA Petroleum Co.*,

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[15] Monopoly leveraging depends on the Hospital's monopoly power in the hospital market. As previously discussed, Dr. Blair's affidavit does not use acceptable economic analysis to support his opinion that the relevant market for hospital services is limited to Mason County, and for that reason alone, the monopoly leveraging claim should be dismissed.

495 U.S. 328, 110 S. Ct. 1884, 1894-95 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986), *cert. denied*, 481 U.S. 1029 (1987). Clearly, consumers are free to switch to lower priced alternatives unless the challenged competitor has coerced (or forced) consumers to accept its product. But in this case, the majority acknowledges that the district court was correct in finding there was no coercion. Slip. Op. at 10. Any potential customer that cared enough to comparison shop and/or to request M & M products was free to do so.[16] Admittedly, some customers may not have compared prices or expressed their preference for M & M, but indifference does not create antitrust injury. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 489-90 (3d Cir.), *cert. denied*, 113 S. Ct. 196 (1992) (en banc).[17]

The need for insuring that antitrust injury exists is even greater where, as here, the antitrust action is brought not by consumers, or surrogates of consumers, but by one competitor against another.[18] *Atlantic Richfield*, 110 S. Ct. at 1894-95 (1990); *Chicago Pro. Sports Ltd. v. NBA*, 961 F.2d 667, 670 (7th Cir.), *cert denied*, 113 S. Ct. 409 (1992).

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[16] The fact that initially petitioners may have set its prices below the plaintiff suggest that consumers can (and do) switch. The fact that petitioner retained customers when prices subsequently were raised suggest that the quality of goods and/or services were perceived as superior.

[17] This decision, which was submitted by the Petitioner-Appellees' supplemental authority was not discussed by the majority.

[18] Thus, the measure of damages requested by M & M relates to its loss of profits, not any injury to consumers. Consumers will not share in any damages obtained by M & M.

The antitrust laws were designed to protect consumers from suppliers, not to protect suppliers from each other.[19]

> Producers often complain about the effects of business rivals, which reduce their profits. Judicial relief from the real injuries caused by rivalry would harm consumers the antitrust laws are supposed to protect. The antitrust injury doctrine requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.

Id. (citations omitted). In this case, the majority describes a lack of diligence, or assertiveness by customers, rather than coercion by the petitioner, as the proximate cause of any loss to M & M.[20]

It is also significant that it was M & M that first approached Petitioner and offered to sell. Only when Petitioner refused to meet M & M's price, did M & M bring this action.[21] If the antitrust laws are to achieve

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[19] M & M may argue that it is unlikely that individual consumers would bring an antitrust suit. But DME supplies are often insured, and large health insurance companies are certainly in the position to bring antitrust suits if they believe that they are being overcharged. *See Atlantic Richfield v. USA Petroleum Co.*, 495 U.S. 328, (1990); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922 (1st Cir. 1984), *cert denied*, 471 U.S. 1029 (1985).

[20] The reference to the petitioner's insistence that in-hospital infant monitors be purchased from a particular source is hardly apposite. The Petitioner is legally responsible for the operation of all equipment used within the hospital and is certainly permitted to select (and purchase) the hospital equipment of its choice.

[21] The majority opinion incorrectly states that "the hospital first attempted to purchase M & M. . . . "

(continued...)

their fundamental purpose of increasing competition by encouraging new entry and discouraging unnecessary consolidation, then ultimate skepticism should be reserved for plaintiffs, like M & M, who first seek to sell, and then sue when a competitor refuses to pay a premium for the offer to exit the market.

Respectfully submitted,
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[21](...continued)
However, the record reveals that is was M & M that first approached the hospital.

APPENDIX B

Filed: January 20, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3100
(CA-88-1099-A)

M & M Medical Supplies and Service, Inc.
Plaintiff-Appellant,

versus

Pleasant Valley Hospital, etc., et al.
Defendants-Appellees.

ORDER

The Court amends its opinion filed December 9, 1992, as follows:

On page 5, third full paragraph, line 9 -- the name "Galia" is corrected to read "Gallia."

On page 6, second full paragraph, line 6 -- the phrase "motion to summary judgment" is corrected to read "motion for summary judgment."

On page 18, second full paragraph, line 7 -- the word "Higlands" is corrected to read "Highlands."

On page 21, third full paragraph, line 3 -- the cross-reference to "ante at 11-12" is corrected to read "ante at 11-13."

On page 22, first full paragraph, line 4 -- the cross-reference to "Ante at 12" is corrected to read "Id."

On page 24, first full paragraph, line 4 -- the cross-reference to "Ante at 13" is corrected to read "Ante at 12."

On page 24, second full paragraph, line 15 -- the cross-reference to "supra at 2-4" is corrected to read "supra at 18-21."

On page 24, footnote 5, line 2 -- the cross-reference to "supra at 3-4" is corrected to read "supra at 20-21."

For the Court - By Direction

/s/ Bert M. Montague
Clerk